Justice Committee

Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill at Stage 2

Response from the Crown Office and Procurator Fiscal Service

I attach the Crown Office and Procurators Fiscal's response to the Justice Committee's Report on the Offensive Behaviour at Football and Threatening Communications (Scotland) Bill. I welcome the Committee's support of new offences to address these issues and acknowledge your comments seeking further clarity on various aspects of the provisions.

As you know from my evidence, I fully endorse the introduction of specific offences relating to offensive behaviour at football matches and threatening communications. The offences will provide an invaluable tool for the police and prosecutors to target and tackle the unacceptable behaviour that has been associated with football. The offences will also assist in providing certainty and clarity for the police and prosecutors when dealing with such conduct.

In the report, the Committee raised specific issues that relate both to my own role and as the Minister with responsibility for the prosecution of crime. I attach a response to these issues and, in particular, those set out at paragraphs 135, 136, 140, 141, 167, 195 and 220.

As I advised the Committee when I gave evidence on 20 September, the Guidelines to Police, are currently draft Guidelines and they will be revised to take into account of any amendments or further observations by the Committee or Parliament during the passage of the Bill. The latest draft guidance to Chief Constables includes further guidance on the type of conduct and behaviour covered by the provision relating to offensive behaviour at football matches and the televising of football matches. I have highlighted the additional text.

To respond to some of the concerns raised in your Report and to facilitate discussion at the next stages of the Bill, I intend to make the draft guidelines available via SPICe prior to the debate in Parliament on 3 November.

I hope this response is helpful.

The Rt Hon Frank Mulholland QC
Lord Advocate
1 November 2011

COPFS Response to Justice Committee Report

135. The Committee pursued the issue of data capture with the Lord Advocate. He was asked whether, under the current law, it would be possible to capture in formal records what type of conduct (eg religious bigotry, racism, homophobia, etc) had been prosecuted. He said that it was his understanding that it would be very hard to do so "working within the confines of the current IT system." (We take the Lord Advocate to be referring to cases where a conviction for an offence involving hateful or offensive behaviour has been obtained but where, for whatever reason, a statutory aggravation was not attached to the charge.)

It is accurate that under the current law that it is not possible to capture the specific type of conduct libelled in a breach of the peace or Contravention of S38 of the Criminal Justice and Licensing (Scotland) Act 2010 in the absence of an aggravation being libelled.

It may assist to explain that Crown Office and Procurator Fiscal Service (COPFS) uses a live operational case management system, specifically designed to receive criminal and death reports from the police and other specialist reporting agencies and to manage these cases for prosecution purposes. The information held on the system is structured for these operational needs, rather than for statistical reporting or research purposes.

The COPFS database can extract information relating to charges reported with an aggravation and the decisions taken in such cases. I attach a link to the most recent COPFS publication relating to all Hate Crimes (including Religious Aggravations) which is published on the COPFS web site:
www.copfs.gov.uk/Publications/2011/05/Hate-Crime-Scotland-2010-11.
This contains data on the numbers of charges reported and decisions taken in the last 5 financial years.

It should be highlighted that offences aggravated by religious prejudice cover all forms of religious intolerance and the COPFS databases cannot identify whether the behaviour is sectarian nor does it specify whether the incident is football related.

As you are aware data of this nature was previously extracted by research commissioned by the Scottish Government in 2006. This requires examination of each police report. The Scottish Government has agreed to undertake similar analysis on an annual basis.

136. It was put to the Lord Advocate that enacting the section 1 offence would not in itself guarantee increased clarity as to why someone had been convicted under the provision (ie, for instance, whether they had been convicted for chanting that was racist rather than homophobic). There might for example need to be sufficient precision in the charge before the court for the relevant data to be captured. The Lord Advocate conceded that this was "a valid point" and that he would "go away and think about it" before finalising his guidelines on the Bill.

Under the proposed new offence in Section 1 of the Bill, this data should be identifiable and extractable. The advantage of the proposed legislation is that Section 1 of the Bill relates solely to offensive behaviour at football matches and a conviction of a contravention of Section 1 will inform prosecutors that the accused has previously offended in a context related to football. This will inevitably result in a motion for a football banning order to be requested and will alert prosecutors to the fact that the accused has previously offended in such a manner.

In addition the precise nature of the conduct such as expressing hatred of a group of persons based on their colour or sexual orientation will be libelled under the specific subsections of section 2(a). So, for example, an offence based on prejudice due to colour or sexual orientation would be libelled as an offence under Section 2(a)(iii) and 2(4)(a) and section 2(a)(iii) and 2(4)(e) respectively. The particular offence and statutory provision will be recorded on the criminal history of the accused which will enable the prosecutor to identify the specific type of offending that led to the conviction.

140. The Committee seeks clarification from the Lord Advocate whether Section 38 was being used this season in arrests at football

There have been police reports submitted to COPFS libelling offences of breach of the peace with religious aggravations where appropriate and section 38 of the Criminal Justice and Licensing (Scotland) Act 2010 has been libelled as an alternative charge. However, for the reasons set out in response to paragraph 135 above, COPFS cannot identify how many football related section 38 charges or breach of the peace charges have been reported as the COPFS database cannot identify the specific behaviour libelled in the charge.

The charge libelled is dependant on the facts and circumstances of each case. As previously advised s38 has certain limitations that can cause difficulties. In particular the offence requires that a person behaves in a threatening or abusive manner which is likely to cause fear or alarm to a reasonable person, and which the person intends or to cause fear or alarm or is reckless as to whether it causes fear and alarm. . Whether the behaviour is likely to cause fear or alarm to a reasonable person is an objective test and evidence of factual fear and alarm is necessary to proof of these offences. This is an additional hurdle that is not required in the proposed section 1 offence and in the particular setting of a football match this requirement can cause evidential difficulties.

In cases involving conduct at football matches, defences have been run that the Crown has failed to prove that the conduct caused fear and alarm or that the conduct was intended to cause such fear and alarm.

In addition section 38, requires conduct of a threatening and abusive nature which is more limited that the envisaged conduct of an offensive or disorderly nature. Further, it does not link the behaviour with the likelihood of inciting public disorder, which is the behaviour that the Bill is seeking to address. It is of note that the terms of section 38 have yet to be tested by the court and it is by no means certain that the courts will hold that conduct that the new offence will cover will be held to constitute

an offence under section 38.

With regard to offences committed at games played by Scottish football clubs elsewhere in the world, neither breach of the peace nor section 38 could be used as they do not contain the relevant extraterritorial powers to allow prosecution in Scotland.

The introduction of a bespoke offence designed to specifically deal with such conduct will allow legal certainty and avoid the need for COPFS to "shoe horn" offending behaviour into the requirements of existing law. With regard to offences committed outwith Scotland, the new offence will enable action to be taken to prosecute those who engage in offensive or threatening behaviour where Scottish clubs are playing in Europe and elsewhere.

141. The Committee agrees that it is important to label offences so that it is clear whether a hate crime has been committed and, if so, what type of hatred it is. "Naming and shaming" can be an important weapon in the criminal law's armoury, in helping to change attitudes about what is considered socially unacceptable. The Committee would welcome clarification that the Crown Office and Procurator Fiscal Service are seeking to ensure the right data is captured for football-related offences.

I refer to the response in relation to paragraphs 135 and 136 above.

167. In his first appearance before the Committee, the Lord Advocate was asked for his views on the application of section 1(5)(b) to a pub where all those present support the same club or to a supporters' club. He replied that he did not want to rush into providing an answer but hoped to be able to write to the Committee on the issue at a later date. At the present time, we have not yet received any further clarification from the Lord Advocate on this point. Nor is the issue covered in his draft guidelines to police officers.

The Crown's understanding is that section 1(5)(b) would apply where all present support the same team. The Lord Advocate will insert guidance on this point in his Guidelines.

195. The Committee acknowledges that offensive behaviour that may provoke public disorder can be a problem in relation to matches televised in public places (pubs for instance), that this sort of behaviour is unacceptable, and that it may sometimes be necessary to apply the criminal law to deal with it. If there is to be a new offence of offensive behaviour at football matches, we accept that it is appropriate that it cover televised matches. But the Scottish Government should consider whether the parameters of the offence in relation to televised matches need to be made clearer.

The Lord Advocate's guidelines have been revised to provide further clarification on the parameters of the offence.

220. The Committee would welcome the Government to provide further on information to them on whether and, if so, why, section 38 of the Criminal

Justice and Licensing (Scotland) Act 2010 is not considered adequate to prosecute threatening online communications, despite a number of apparently successful recent prosecutions.

There have been a number of difficulties with prosecuting such offences.

The most common statutory provision that applies is a contravention of the Communications Act 2003. However, as a result of case law, doubt has been expressed about the definition of “sending” a communication and whether sending includes posting, blogging or using or accessing social networking sites such as Facebook. The new offence specifically addresses this issue.

Furthermore, offences under the Communications Act 2003 are prosecutable only summarily. Some of these cases have seen very offensive and postings that glorify someone's murder or contain threats to kill someone, and such conduct would merit prosecution on indictment. The Bill addresses this difficulty.

In order to circumvent the difficulties of prosecuting under statute, breach of the peace and contraventions of section 38 of the Criminal Justice and Licensing (Scotland) Act 2010, have been libelled but there are limitations to the use of such offences that would be alleviated by the enactment of a bespoke offence targeted at such offending. As with the offensive behaviour section, evidence of factual fear and alarm is necessary to proof of these offences. Whether the behaviour is likely to cause fear or alarm to a reasonable person is an objective test. The threatening communications offence removes the need to prove that the person making the threat intended to carry it out and on proving that the behaviour actually caused fear and alarm.

At present, current legislation could not be used where the offence is committed outside Scotland. This means that a person can evade criminal liability by making threatening communications (whether by sending them in the post or posting on the internet) from outside Scotland, even if the person making it intends the communication to be seen primarily in Scotland. The new offence will enable action to be taken to prosecute those who commit these offences.

Furthermore, as previous advised, unlike elsewhere in the UK, there is no specific offence in Scots law criminalising threats made with the intent of inciting religious hatred. This is an obvious gap when compared to elsewhere in the UK and it is clear, therefore, that legislation is required to address it.